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Proposed Federal Marriage Amendment Raises Issues of Meaning, Reach, and Consistency with Fundamental Constitutional Principles

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At the request of a broad coalition of civil rights, religious, legal, and professional organizations, we have prepared the following analysis of the latest version of a proposed Federal Marriage Amendment ("FMA") to the United States Constitution. This version of the amendment (H. J. Res. 106), introduced by Representative Musgrave, provides:

> Marriage in the United States shall consist solely of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.

SUMMARY

The proposed amendment is ambiguous and self-contradictory. The first sentence obviously means to prohibit same-sex marriages, but the second sentence implicitly permits such marriages in some circumstances. The amendment plainly cannot do both. Moreover, unless the proponents of the FMA mean to ban same-sex marriages in name only, they cannot mean the amendment to permit same-sex civil unions that amount to marriages. Where courts would draw the line between a forbidden "marriage" and a permitted "union" is anyone's guess.

The proposed amendment also appears to reach beyond state action – not only prohibiting recognition of marriages of same-sex couples by government but also threatening recognition of such marriages by religious organizations, private employers, and individuals. Only once before – in the case of slavery – has a particular institution been thought so heinous as to merit total constitutional proscription. The proposed amendment would also mark a retreat from existing constitutional norms of democratic decisionmaking and federalism. Ironically, the amendment would likely increase, not minimize, judicial involvement in the sensitive issues that it addresses.[2]

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[2] The proponents of the FMA do not agree among themselves on what its language means. *See* Alan Cooperman, "Little Consensus on Marriage Amendment: Even Authors Disagree on Meaning of its Text," *Wash. Post*, Feb. 14, 2004, at A01. They also disagree about what its language should be. For example, an earlier version introduced by Senator Allard (S. J. Res. 26) and Representative Musgrave (H.J. Res. 56), provides:

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THE FMA IS AMBIGUOUS AND SELF-CONTRADICTORY

The first sentence of the FMA is at war with the second; both cannot simultaneously be given effect. The first sentence of the FMA defines "marriage in the United States" exclusively as "the union of a man and a woman." The second sentence of the FMA, however, implies that "marriage" of same-sex couples could be recognized as long as that recognition is not deemed to be constitutionally required. The two sentences cannot both be given effect. If the first sentence prohibits marriages of same-sex couples in all circumstances, the second sentence cannot permit such marriages in some circumstances. If the second sentence allows same-sex marriages in some circumstances, the first sentence cannot prohibit such marriages in all circumstances.

The ban on marriage of same-sex couples in the first sentence of the FMA guarantees legal challenges to the civil unions and domestic partnerships impliedly allowed by the second sentence. Legislation extending to same-sex couples the "legal incidents" of marriage under the second sentence would inevitably be challenged as an end-run around the prohibition of same-sex marriage in the first sentence of the FMA. The argument would be that if the first sentence of the FMA is to have any real meaning, it cannot be read simply to bar the use of "marriage" as a label but must be read to bar same-sex unions that are "marriages" in substance.

Opponents of same-sex marriage have already made clear that they would use the first sentence of the FMA to thwart recognition of civil unions or domestic partnerships ostensibly permitted by the second sentence. They would do so by asserting that those unions and partnerships amount to same-sex marriage. Moreover, the opponents of same-sex marriage have vowed to visit retribution on judges who reject their challenges.

In California, for example, opponents of marriage rights for gay couples are challenging a pair of domestic partnership laws (2003 AB 205 and 2001 AB 25) as an end-run around the California Defense of Marriage Act, *Thomasson v. Schwarzenegger*, Case No. BC302928 (Cal. Super. Ct.); *Knight v. Schwarzenegger*, Case No. 03AS05284 (Cal. Super. Ct.). On September 8, 2004, the Superior Court rejected their challenge to these laws. The challengers have vowed to appeal the decision and to mount a ballot drive to recall the judge. [3] Opponents of same-sex marriages are similarly challenging a Philadelphia "life partnership" ordinance as violative of Pennsylvania's Defense of Marriage Act, Br. of Appellees at 8, *Devlin v. City of Philadelphia*, No. 43 EAP 2003 (Pa. Sup. Ct.)

> Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, *nor state or federal law*, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups. [Emphasis added]

[3] Susan Jones, "Conservative Group Rejects 'Homosexual Marriage by Another name,'" *available at* http://www.cnsnews.com// ViewCulture.asp?Page= \Culture\archive\200409\C (last visited Sept. 18, 2004).

("The city of Philadelphia does not have the authority to define by regulation or Ordinance any type of marriage or marriage-like relationship.") (emphasis in original).

The prospect of such legal challenges would likely chill the enactment of civil-union and domestic partnership laws. If such legislation were nevertheless enacted, the ensuing legal challenges would stall the legislation in the courts and force the courts to determine in each instance whether a legal relationship looks "too much" like marriage to withstand FMA challenge. The FMA would thereby expand, not restrict, the role of the courts. Ironically, Judge Robert H. Bork, an author of the FMA, opposed the Equal Rights Amendment on the ground that the amendment would depend on the courts "to decide what sexual equality is."[4] Notwithstanding the stated aim of its proponents to place the issues addressed by the FMA beyond the reach of the courts, the FMA would depend on the courts to decide what "marriage" is and what "the legal incidents thereof" comprise.

THE FMA WOULD THREATEN PRIVATE RECOGNITION OF MARRIAGE OF SAME-SEX COUPLES, EVEN BY RELIGIOUS BODIES

Like the Thirteenth Amendment, which prohibits slavery, the FMA by its terms is not limited to government action but also reaches private action. Just as the Thirteenth Amendment states that "[n]either slavery nor involuntary servitude . . . shall exist in the United States,"[5] so the first sentence of the FMA states that "marriage in the United States shall consist only of the union of a man and a woman."[6]

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[4] McGuigan, "An Interview with Judge Robert H. Bork, Judicial Notice" (June 1986), quoted in *Nomination of Robert H. Bork To Be Associate Justice of the Supreme Court of the United States: Hearings before the Senate Comm. on the Judiciary*, Part 5, 100th Cong., 1st Sess. 5615 (1986) (statement of National Women's Law Center).

[5] *See, e.g.*, *The Civil Rights Cases*, 109 U.S. 3, 19 (1883) (Thirteenth Amendment is "primary and direct in its character; for the Amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States"); Akhil Reed Amar, "Remember the Thirteenth," 10 Const. Comment. 403, 403 (1993) ("[H]owever true generally the notion that the Constitution applies only to action of the state – the government – the Thirteenth Amendment is an important counter-example, and its significance is underappreciated in a wide range of contexts."); Gerald Gunther, *Constitutional Law* 888 (12th ed. 1991) ("[T]he majority in the Civil Rights Cases recognized that the 13th Amendment is not limited to state action and extends to private actors as well.").

[6] Ironically, while echoing a constitutional amendment that bars slavery, the FMA also echoes infamous proposals to amend the Constitution to bar interracial marriage. Nearly a century ago a bill was introduced in Congress to amend the Constitution to prohibit "[i]ntermarriage between negros or persons of color and Caucasians . . . within the United States." H. J. Res. 368, 62d Cong., 3d Sess. (1912). Proponents of the FMA attempt to distinguish their amendment from this and other justly reviled relics of intolerance and cruelty by arguing that, unlike race, sexual orientation is a matter of

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Proponents of the FMA are likely to use the sweeping and unqualified language of the amendment to seek to prevent those religions that marry couples of the same sex in religious ceremonies from continuing to do so. Invoking the broad (and correct) interpretation of the Thirteenth Amendment as barring slavery by private persons, opponents of equal marriage rights for same-sex couples would likely endeavor to use the FMA to prohibit even private institutions (including religious bodies) and individuals (including clergy) from recognizing or performing marriages of same-sex couples.

The language of the FMA is so broad that states and other governmental bodies might even try to use the FMA to punish religious organizations and individuals for performing or participating in religious marriages of same-sex couples. Such punishment could take the form of criminal or civil sanctions or, for example, disqualifying gay men and lesbians married in same-sex religious ceremonies from working in government jobs, prohibiting government funds from going to organizations affiliated with a religious group that conducts marriage ceremonies of gay couples, or denying charitable tax status to such religious organizations. *See Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (upholding state Attorney General's withdrawal of job from lawyer who had entered into religious marriage with her same-sex partner). Ultimately, courts may decide that the Free Exercise Clause of the First Amendment no longer protects participation in a purely religious marriage ceremony in view of the FMA. Courts will likewise have to decide whether the FMA qualifies other constitutional provisions, including the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment.

In addition, because opponents of marriage rights for gay couples would likely argue that the second sentence of the FMA cannot be used to circumvent the first, the FMA's ban on same-sex marriage could even extend to public and private sector employment agreements that confer enforceable contract rights on same-sex couples under the second sentence of the FMA (*e.g.*, health insurance for the domestic partners of employees). Opponents of marriage rights for same-sex couples (and more than a few employers) would likely contend that such contracts are contrary to public policy, and therefore null and void, on the ground that such contracts violate the FMA by effectively recognizing same-sex marriage or providing the "legal incidents" of marriage. *See Shelly v. Kraemer*, 334 U.S. 1 (1948). Among the other results would be to limit an important area of collective bargaining.

"choice" and therefore morals. Even if such an argument (if conclusively proven) could be permitted to justify prohibiting same-sex marriage, the argument, at best, is currently only one side of a broad ongoing debate about the origins and nature of sexual orientation. This debate implicates profound and unsettled scientific, social, and religious issues. The Constitution should not be amended to settle such a debate by fiat.

THE FMA DISPLACES DEMOCRATIC DECISIONMAKING

Justice Scalia has stated: "The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution." *United States v. Virginia*, 518 U.S. 515, 566-67 (1996) (dissenting opinion). The first sentence of the FMA, however, would do just that. It would write into the Constitution the "smug assurance" that marriage of same-sex couples is wrong and thereby prevent the people, through their elected representatives, from recognizing such marriages. It would also prohibit the people of a state from directly recognizing marriages of same-sex couples through an amendment to their own state constitution.

THE FMA IS INCONSISTENT WITH PRINCIPLES OF FEDERALISM

Although the FMA's supporters include ardent advocates of limited federal power, the second sentence of the proposed amendment would tell each state's elected and appointed officials, as a matter of federal constitutional law, how they may and may not interpret their own constitutions – regardless of how those officials might understand the will of their state's own citizens as embodied therein. Under the amendment, neither a state's legislature, nor its executive branch officials, nor its judiciary, nor any officials of its political subdivisions, could act on the basis of their bona fide understanding of the meaning of their state's constitution if their understanding is one to which the FMA forbids them to give effect – even though a state's constitution "reflects both the considered judgment of the state legislature that proposed it and that of the citizens of [the state] who voted for it." *Gregory v. Ashcroft*, 501 U.S. 452, 471 (1991).[7]

The affront to federalism is obvious. "Within our federal constitutional system the substantive rights provided by the Federal Constitution define only a minimum." *Mills v. Rogers*, 457 U.S. 291, 300 (1982). Accordingly, "state courts are absolutely free to interpret state constitutional provisions to accord greater protections to individual rights than do similar provisions of the United States Constitution." *Arizona v. Evans*, 514 U.S. 1, 8 (1995); *Locke v. Davey*, 124 S. Ct. 1307, 1313-14 & n.8 (2004) (by implication). *See, e.g., First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174 (Wash. 1992) (rejecting Free Exercise standard set by *Employment Div. v. Smith*, 494 U.S. 872 (1990), in favor of more religion-protective rule); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (affirming state court decision according greater Free Speech rights than First Amendment).

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[7] To be sure, the Constitution, through the Contracts Clause and the Fourteenth Amendment, currently constrains particular types of state action rooted in a state constitution. Those provisions, however, constrain such state action regardless of whether it derives from a state's constitution. By contrast, the second sentence of the FMA prohibits same-sex marriage and civil unions only to the extent that either is thought to be rooted in a state's constitution.

The FMA would curtail state sovereignty, moreover, in an area where state authority has traditionally been at its zenith. "Domestic relations are preeminently matters of state law." *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2309 (2004) (quoting *Mansell v. Mansell*, 490 U.S. 581, 587 (1989)). These matters comprise "an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). The FMA would overthrow state authority in this core area simply because its proponents disapprove of the decisions of some state courts.

THE FMA WOULD CONSTRAIN ALL THREE BRANCHES OF GOVERNMENT

Although the FMA is championed by critics of "robed tyrants" and a "rogue judiciary," the proposed amendment would forbid not just judges but members of the other two branches from giving effect to their interpretations of federal and state constitutional commands, because the FMA would bar them from "construing" either constitution to require the conferral of marital status or the legal incidents thereof on same-sex couples. The FMA would thus take the job of constitutional interpretation away from officials of all three branches of government.

The language of the FMA is a particular slap at state courts, which the Supreme Court has long recognized are "the ultimate expositors of state law." *McElroy v. Holloway*, 451 U.S. 1028, 1031 (1981) (Rehnquist, J., joined by Burger, C.J., dissenting) (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975)). Although a state constitution may not permit something that an otherwise valid federal law forbids, the FMA actually purports to tell state courts how they may and may not interpret their own constitutions. The result in both cases may be the same, but the means to the result count. The federal Constitution should not purport to say what state law does or does not mean.

THE FMA WOULD PRECIPITATE CONTINUING STRUGGLE

The FMA's ambiguities, only some of which are discussed above, would invite collisions among the separate branches of government and produce protracted and divisive litigation. In addition to those ambiguities, courts would have to decide, for example, what constitutes a "union" within the meaning of the FMA, and what are to be considered "legal incidents" of marriage. Although the FMA purports to tell courts how they may and may not interpret the Constitution, courts necessarily will remain responsible for interpreting the language of the FMA itself. Even the FMA's proponents do not agree on what its language means. *See* Alan Cooperman, *supra* note 2. The ambiguities in the language of the FMA are certain to invite extended litigation and embroil the courts in the very issues that the amendment's proponents mean to preempt.

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